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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 717

PAUL CRUMP,

Petitioner,

vs.

FRANK G. SAIN, Sheriff,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Paul Crump, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on October 16, 1961, *reh. den.*, November 14, 1961.

CITATIONS TO OPINIONS BELOW AND TO RELATED OPINIONS.

The opinion of the Court of Appeals, set forth in Appendix A hereto, is reported at 295 F.2d 699 (7th Cir. 1961). The judgment of the Court of Appeals is set forth in Appendix B hereto.

The Findings of Fact and Conclusions of Law of the District Court are not reported. They are set forth in

Appendix C hereto, and may be found at pages 100-104 of the blue bound transcript of record.

A prior opinion of the Court of Appeals is reported at 264 F.2d 424 (7th Cir. 1959).

The opinion of the Supreme Court of Illinois reversing Petitioner's conviction at his first trial is reported at 5 Ill.2d 251 (1955).

The opinion of the Supreme Court of Illinois affirming petitioner's conviction at his second trial is reported at 12 Ill.2d 402 (1957). The order of this Court denying certiorari is reported at 357 U.S. 906, *reh. den.*, 357 U.S. 944 (1958).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals denying Petitioner's timely application for rehearing was entered on November 14, 1961.

QUESTIONS PRESENTED

1. Was the defendant denied due process of law by the refusal of the investigation officers to allow him to consult with an attorney upon demand being made to do so while he was in custody?

2. Was the defendant denied due process of law by the admission into evidence of two confessions which were taken from him while in custody when Petitioner had not been allowed to consult with his attorney during the period immediately preceding his confessions, although he had been permitted to consult his attorney 22 hours prior to the signature of his second confession?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment 14, Section 1:

". . . [N]or shall any State deprive any person of life . . . without due process of law . . ."

United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Title 28 U.S.C. § 2241:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . .

• • •

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • •

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT.

Petitioner Paul Crump seeks review of the decision of the Court of Appeals for the Seventh Circuit, which affirmed an order of the District Court for the Northern District of Illinois quashing a writ of habeas corpus.

Paul Crump is a prisoner in the Cook County, Illinois Jail, having been convicted of murder in the courts of Illinois. He is under sentence of death by electrocution. Ex. A, Abst. 653-54.

A. THE RECORD.

The proceedings below were *in forma pauperis*. Therefore, no record was printed for the Court of Appeals, and petitioner is here on the original papers comprising the transcript of record below. The mode of citation to

the record in this petition is therefore necessarily more complex than is usual in printed petitions filed with this Court.

Citations to the volume of the record which contains the pleadings and written orders in the District Court below will be made in the customary form, *e.g.*, "R. 25". This volume is separately bound with blue paper covers and its pages are separately numbered.

Citations to the court reporter transcripts of the oral proceedings in the District Court below will be made by designating these transcripts ("Trans.") and citing to the relevant page number, *e.g.*, "Trans. 51". These District Court transcripts comprise two pamphlets with brown paper covers. Their pages are numbered consecutively throughout with digits in the upper right corner of each page.

The bulk of the record in this case is contained in the four volumes of Respondent's Exhibit A, and the five volumes of Respondent's Exhibit B. Exhibit A is the complete record of all state court proceedings at petitioner's first trial. Exhibit B is the complete record of all state court proceedings at petitioner's second trial.

The last volume of Exhibits A and B is, in each instance, bound in brown plastic covers. All other volumes of these two exhibits are bound in black boards.

In each instance, the two brown plastic volumes contain the printed "Abstract of Record" which was utilized by the parties during petitioner's successive appeals to the Illinois Supreme Court. The other volumes of these two exhibits contain the court reporter's transcript upon which the Abstract was based. The Abstract is a condensation of the reporter's transcript, and, for all practical purposes, constituted the "record" upon which

the Illinois Supreme Court considered petitioner's appeals. Ill. Rev. Stat., Ch. 110, § 101.38; *People* v. *Clark*, 9 Ill.2d 46, 50-51 (1956).

Practically all of the record references to State court proceedings in this petition for certiorari will refer to the page numbers of these printed Abstracts contained in Volumes IV and V of Exhibits A and B respectively. The citations will designate the Exhibit Number, the Abstract, and the page number within the Abstract, thus: "Ex. A, Abst. 158-59; Ex. B, Abst. 694 (Lt. Pape, State's Witness)."

B. THE PROCEDURAL HISTORY:

Petitioner was convicted of murder in the Criminal Court of Cook County in 1953. Ex. B, Abst. 30. His conviction was set aside by the Illinois Supreme Court and a new trial ordered, on non-constitutional grounds *People* v. *Crump*, 5 Ill.2d 251 (1955).

On remand, petitioner was tried, convicted, and sentenced to death once again. Ex. A, Abst. 653-54. The Illinois Supreme Court affirmed, this time passing on the federal question raised here. *People* v. *Crump*, 12 Ill. 2d 402, 403-404 (1957). A timely petition for certiorari was denied. 357 U.S. 906, *reh. den.*, 357 U.S. 944 (1958).

Petitioner then filed his federal habeas corpus petition. It was dismissed without a hearing. The Court of Appeals reversed and remanded for a hearing. 264 F.2d 424 (7th Cir. 1959).

On remand, the District Court conducted a hearing (see Trans., *passim.*) and denied relief. R. 100-104. The Court of Appeals affirmed, 295 F.2d 693 (7th Cir. 1961), and this petition for certiorari followed.

C. THE UNCONTROVERTED FACTS:

1. THE CRIME, CONFESSION, AND CONVICTION.

Theodore P. Zukowski, a plant guard, was murdered during a robbery at the Chicago Stockyards in 1953. Petitioner was arrested, interrogated by police and prosecutors, made two confessions, was indicted, tried by jury, convicted of murder and sentenced to death. See 12 Ill.2d at 403-404.

At the time of his arrest, interrogation and confession, petitioner was a 22 year old[1] "colored boy."[2] He had not completed high school.[3] He had some prior experience in criminal proceedings, having been convicted in three robbery cases on the same day in 1946, when he was 16 years old.[4]

2. THE DETENTION AND INTERROGATION OF PETITIONER BY POLICE AND PROSECUTORS.

The First Night:

On Friday, March 20, 1953,[5] petitioner, in company with one Eugene Taylor, approached the front door of a friend's apartment. It was 10:30 P.M.[6]

Petitioner knocked on the door. The door was flung open. Police officers rushed out. Petitioner fell to his

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[1] Ex. A, Abst. 500 (People's Exhibit 23).

[2] Ex. A, Abst. 130 (Dr. Brams, State's Witness).

[3] Ex. A, Abst. 525 (Crump).

[4] Ex. A, Abst. 605-606 (Chief Clerk Rosen, State's Witness).

[5] Ex. A, Abst. 73 (Officer Bongiorno, State's Witness).

[6] Ex. A, Abst. 70 (Officer Bongiorno, State's Witness); Abst. 13-14 (Crump).

The apartment belonged to one Hudson Tillman, who was ultimately convicted of participation in the stockyards murder-robbery.

knees. Taylor ran. An officer fired two shotgun blasts into the air. The flash of the shotgun momentarily blinded petitioner.[7]

The police brought petitioner into the apartment. Four officers were present. Petitioner and Taylor (who had been chased and caught) were forced to lie down on the floor of the apartment.[8]

Petitioner remained lying on the floor in the apartment for 30 to 45 minutes. Officers from the Robbery Detail were called, came to the apartment, and Petitioner and Taylor were "turned over" to them.[9]

The Robbery Detail officers arrived at midnight. They took Petitioner and Taylor to the 18th District, "Stockyards" Police Station of the Chicago Police Department. The group arrived at the station at 12:30 A.M. Petitioner and Taylor were "turned over . . . to Captain Reynolds," commander of the station.[10]

Upon arrival, the prisoners were taken into a room and told to stand against a wall. They were ordered to strip. The police began to question them while they were

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[7] Ex. A, Abst. 70-71, 74, 80 (Officer Bongiorno, State's Witness); Abst. 13 (Crump).

[8] Ex. A, Abst. 75 (Officer Bongiorno, State's Witness); Abst. 113 (Officer Dean, State's Witness); Ex. A, Abst. 15 (Crump).

[9] Ex. A, Abst. 71 (Officer Bongiorno, State's Witness, "[A]bout half an hour to forty minutes."); Ex. A, Abst. 88 (Sgt. Glas, State's Witness, "[I]t was forty-five minutes, may have been a half hour.").

[10] Ex. A, Abst. 111 (Officer Morrison, State's Witness); Ex. A, Abst. 170 (Capt. Reynolds, State's Witness); Ex. A, Abst. 159 (Lt. Pape, State's Witness).

undressing. The interrogation continued after the prisoners were stripped naked.[11]

The room was small. Between 17 and 20 individuals were present.[12]

The questioning was conducted by Captain Reynolds, Sergeant Pierson (erroneously identified as "Sgt. Pierce" by petitioner in his testimony) and 5 or 6 other men.[13] The police were questioning petitioner about the killing in the stockyards. Petitioner denied that he knew anything about it.[14]

After petitioner had finished undressing, he was told to turn around and spread his legs. The police told him to hold up his feet. Petitioner was standing with his back to the wall. His interrogators were standing around him in a semi-circle.[15]

After the initial interrogation was concluded, petitioner was permitted to dress himself again, and was permitted to sit down.[16]

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[11] Ex. A, Abst. 16, 42 (Crump). Petitioner's detailed testimony concerning the events between the time of his arrival at the Stockyards Station and the time he entered a cell over an hour later (see note 17, infra), stands entirely uncontradicted. Captain Reynolds (Ex. A, Abst. 170-75; Ex. B, Abst. 423-36), Sergeant Pierson (Ex. A, Abst. 85-88), and Lieutenant Pape (Ex. A, Abst. 158-63; Ex. B, Abst. 694-98) all testified at length in one or both of petitioner's trials. There is not one word in their testimony which either expressly or by implication denies the assertions made in the text of this Petition at notes 11-16.

[12] Ex. A, Abst. 16, 41 (Crump).

[13] Ex. A, Abst. 17, 42 (Crump).

[14] Ex. A, Abst. 43 (Crump).

[15] Ex. A, Abst. 42-43 (Crump).

[16] Ex. A, Abst. 42 (Crump).

At 1:40 A.M., petitioner was removed from the interrogation room, and was placed in a cell.[17] At some point between 2:00 and 3:00 A.M., Sergeant Pierson, Captain Reynolds, and another police officer entered petitioner's cell and resumed the interrogation.[18] Sergeant Pierson was in the lock-up with petitioner for "a couple of hours off and on."[19]

The First Day:

At 6:00 A.M. on Saturday, March 21, petitioner was awakened in his cell and fed.[20] Petitioner was held in his cell all day. He was fed at about noon.[21] Petitioner was being held "open." He was recorded as a prisoner of the Detective Bureau.[22]

The Second Night:

From 4:00 P.M. to midnight on Saturday, petitioner remained in his cell.[23] From midnight until 8:00 A.M. on Sunday, March 22, petitioner remained in the cell.[24]

The Second Day:

Petitioner remained in the cell at the Stockyards Station until 2:05 P.M. on Sunday. At that time he was

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[17] Ex. A, Abst. 113-14 (Officer Lawrence, State's Witness).

[18] Ex. A, Abst. 86, 87 (Sgt. Pierson, State's Witness); Ex. A, Abst. 172 (Capt. Reynolds, State's Witness); Ex. A, Abst. 114 (Officer Lawrence, State's Witness). Cf., Ex. A, Abst. 58 (Crump).

[19] Ex. A, Abst. 87 (Sgt. Pierson, State's Witness).

[20] Ex. A, Abst. 114 (Officer Lawrence, State's Witness).

[21] Ex. A, Abst. 116 (Officer Grace, State's Witness).

[22] Ex. A, Abst. 115 (Officer Lawrence, State's Witness).

[23] Ex. A, Abst. 117 (Officer Lechert, State's Witness).

[24] Ex. A, Abst. 135 (Officer McNally, State's Witness).

removed from his cell by Detective Bureau personnel and transported to the Central Police Headquarters at 11th and State Streets in Chicago.[25] At 2:40 P.M., petitioner arrived at the Detective Bureau lock-up at Police Headquarters. He was in handcuffs.[26] An "arrest slip" was filled out. The slip bore the notation "Hold him for Lt. Pape."[27]

By 3:00 P.M. petitioner had been removed from the lock-up and taken before one Lieutenant Frank Pape, who was then commander of the Robbery Detail of the Detective Bureau.[28]

Petitioner was alone with Pape between 3:00 and 4:00 P.M.[29] Pape asked petitioner questions and accused him of participating in the robbery.[30]

At 5:00 P.M. petitioner was placed on exhibition in a "show-up" in the Detective Bureau.[31] It appears that this was only one of many show-ups at which petitioner was displayed on this day.[32]

Petitioner was then returned to his cell.[33]

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[25] Ex. A, Abst. 116 (Officer Grace, State's Witness); Ex. A, Abst. 138-39 (Officer Hastings, State's Witness).

[26] Ex. A, Abst. 136 (Officer Currin, State's Witness); Ex. A, Abst. 138 (Officer Hastings, State's Witness).

[27] Ex. A, Abst. 137 (Officer Currin, State's Witness).

[28] Ex. A, Abst. 159 (Lt. Pape, State's Witness).

[29] Ex. A, Abst. 159 (Lt. Pape, State's Witness).

[30] Ex. A, Abst. 44 (Crump). Lieutenant Pape never denied this testimony by petitioner. See Ex. A, Abst. 158-63 (Lt. Pape, State's Witness).

[31] Ex. A, Abst. 161 (Lt. Pape, State's Witness).

[32] Ex. A, Abst. 21, 44 (Crump). The State's witnesses neither affirmed nor denied this testimony by petitioner.

[33] Ex. A, Abst. 21, 58 (Crump).

The Third Night:

At approximately 9:00 P.M., petitioner was removed from his cell for further interrogation.[34] A number of officers attended the session. Lieutenant Pape was present and participated in it.[35]

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[34] Ex. A, Abst. 58 (Crump).

[35] Ex. A, Abst. 21-24, 44-45 (Crump).

Neither Pape nor any other State's witness denied that petitioner was in fact interrogated during this period. Of course, all concerned did deny petitioner's testimony that he was tortured at this or any other time.

It should also be noted that the Detective Bureau lockup keeper who was on duty at the time swore that he "didn't see" petitioner taken out of his cell at any time between 2:40 P.M. and 11:00 P.M. on Sunday. Ex. A, Abst. 137 (Officer Currin, State's Witness), and that petitioner was in his "custody" throughout. Ex. A. Abst. 136 (Officer Currin, State's Witness).

However, this testimony cannot be taken as a denial that petitioner was in fact removed from his cell during this period, because it is clear by Lieutenant Pape's testimony that petitioner was in Pape's office between 3:00 and 4:00 P.M. and was in a "show-up" at 5:00 P.M. on that day. Officer Currin may have fallen asleep, or been distracted by the press of other duties.

In any event, it is clear that "all of the lockup is not visible to the lockup keeper. Not 'from our desk it isn't.'" Ex. A, Abst. 141 (Officer Scholtz, State's Witness).

On the other hand, only lockup keepers have keys to the cells, no other members of the Department do. Ex. A, Abst. 141 (Officer Scholtz, State's Witness). Thus, it appears that lockup keeper Currin must have unlocked petitioner's cell and removed him from it on one or more occasions during his tour of duty and then simply forgot that he had done so. We cannot know the answer. No impartial observers were present.

At 11:00 P.M., petitioner was back in his cell.[36] At 5:30 A.M., petitioner was fed in his cell.[37]

The Third Day:

On Monday morning, petitioner was taken out of his cell and brought downstairs for an interview with Lieutenant Pape.[38] It was 10:00 A.M.[39] Pape questioned petitioner about the murder. Petitioner denied any knowledge of the murder.[40] Pape then stated that Petitioner would be released, and petitioner was taken back to his cell once more.[41]

At 10:40 A.M., petitioner was released from custody without charge.[42]

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[36] Ex. A, Abst. 139-40 (Officer Scholtz, State's Witness). Officer Scholtz, the lockup keeper on the midnight to 8:00 A.M. shift, testified he did "not remember" whether petitioner was removed from his cell for further interrogation that night. Ex. A, Abst. 140-41 (Officer Scholtz, State's Witness).

[37] Ex. A, Abst. 139 (Officer Scholtz, State's Witness).

[38] Ex. A, Abst. 24-25, 46-47 (Crump).

[39] Ex. A, Abst. 162-63 (Lt. Pape, State's Witness).

[40] Ex. A, Abst. 46-47 (Crump).

[41] Ex. A, Abst. 25-26 (Crump).

[42] Ex. A, Abst. 142 (Officer Murphy, State's Witness). Lieutenant Pape's decision to release petitioner was apparently due to the intervention of petitioner's attorney William Gerber, who appeared in Pape's office and demanded that petitioner either be charged with a crime or released. Pape stated to Gerber that he "had nothing on Paul Crump" and ordered his release. Trans. 180-81, Ex. A, Abst. 593 (Attorney Gerber, Defense Witness); Ex. A, Abst. 162, Ex. B, Abst. 696-97 (Lt. Pape, State's Witness).

Petitioner went home on a street car. He was sick. He had a fever. His wife gave him quinine. He went to bed. It was Monday, March 23, 1953.[1]

Petitioner had been held *incommunicado* for 60 hours and 10 minutes by the police.

The Fourth Night Through The Fifth Day:

Petitioner remained home sick in bed on Monday night, all day Tuesday, Tuesday night, and all day Wednesday. His mother was unable to find a doctor who was willing to come to the house.[2] On Tuesday his fever mounted and his sister called a doctor and made an appointment for the following day.[3]

The Sixth Night:

Between 7:00 and 8:30 P.M. on Wednesday, March 25,[4] petitioner's sister took him to the office of Dr. Issac Rosen.[5]

Dr. Rosen took petitioner's temperature. It was 106½. The doctor injected 200,000 units of penicillin. He gave petitioner a three day supply of sulpha tablets and a bottle of cough medicine to take home with him.[6]

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[1] Ex. A, Abst. 26 (Crump).

[2] Ex. A, Abst. 595 (Lonie Crump, Defense Witness).

[3] Ex. A, Abst. 26 (Crump).

[4] Ex. B, Abst. 353 (Dr. Rosen, Court's Witness).

[5] Ex. A, Abst. 595 (Lonie Crump, Defense Witness); Ex. A, Abst. 26, 58 (Crump); Ex. A, Abst. 69 (Maxine Crump, Defense Witness).

[6] Ex. A, Abst. 118-119 (Dr. Rosen, State's Witness); Ex. A, Abst. 563-64 (Dr. Rosen, Defense Witness).

Dr. Rosen did not observe any bruises, contusions, or abrasions on petitioner's body. Petitioner made no complaint about police brutality. He said he had "a cold."[49]

By 9:00 P.M., petitioner was back in bed.[50] His temperature was still in excess of 103.[51]

Between 3:00 and 3:30 A.M., a number of police officers received orders to go to petitioner's home and arrest him.[52]

Between 4:00 A.M.[53] and 4:30 A.M.[54] ten police officers approached petitioner's apartment.[55] Some of them entered it. They had no warrant. They entered petitioner's bedroom.[56] Petitioner was in bed.[57] He was "not dressed."[58]

Petitioner told the officers that he was sick.[59] He was permitted to dress. He was handcuffed.[60]

The policemen placed petitioner in a squad car and drove away. The stopped at a cafeteria, and brought out coffee and a doughnut for petitioner.[60]

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[49] Ex. A, Abst. 582 (Crump); Ex. A, Abst. 118-19 (Dr. Rosen, State's Witness); Ex. A, Abst. 563-64 (Dr. Rosen, Defense Witness).

[50] Ex. A, Abst. 27 (Crump).

[51] Ex. A, Abst. 595 (Lonie Crump, Defense Witness).

[52] Ex. A, Abst. 97 (Officer Malek, State's Witness).

[53] Ex. A, Abst. 82 (Officer McLaren, State's Witness).

[54] Ex. A, Abst. 71, 76 (Officer Bongiorno, State's Witness).

[55] Ex. A, Abst. 71-72 (Officer Bongiorno, State's Witness).

[56] Ex. A, Abst. 92 (Officer Kalivoda, State's Witness).

[57] Ex. A, Abst. 77 (Officer Bongiorno, State's Witness).

[58] Ex. A, Abst. 94 (Officer Mead, State's Witness).

[59] Ex. A, Abst. 28 (Crump); Ex. A, Abst. 78, 90, 92, 93-94, 98 (Officers Bongiorno, Collins, Kalivoda, Mead, and Doyle, State's Witnesses).

[60] Ex. A, Abst. 72 (Officer Bongiorno, State's Witness).

The Sixth Day:

The police, with petitioner in tow, arrived at the Cook County Criminal Courts Building between 5:00 and 5:30 A.M. on Thursday, March 26.[60]

Petitioner was led to a room in the offices of the State's Attorney of Cook County which occupied the second floor of the Criminal Courts Building.

From the time of his arrival until 8:00 A.M., Petitioner was held in "what you call the police department."[61] Throughout this two and a half hour period, petitioner was held in this office in the presence of police officers from the State's Attorney's office, the Homicide Detail, and the Robbery Detail of the Chicago Police Department.[62] At 8:00 A.M., petitioner was removed from the

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[60] Ex. A, Abst. 29 (Crump), Ex. A, Abst. 72 (Officer Bongiorno, State's Witness).

The stop for coffee could not have been very long. According to the State's witnesses, the following events transpired between petitioner's arrest at approximately 4:30 A.M. and the group's arrival at the Court Building between 5:00 and 5:30 A.M.:

1. Petitioner was roused from bed.
2. Petitioner was permitted to dress and was handcuffed.
3. Petitioner and his captors walked "a half a block" to where Bongiorno's squad car was parked. (See Ex. A, Abst. 72, Bongiorno).
4. The group drove to the Criminal Courts Building, stopping for coffee and doughnuts on the way.

The Criminal Courts Building is at 2600 South California Ave. (See Ex. A, Vol. I, pp. 43-44.) This is 84 blocks North and 12 blocks West of petitioner's home at 1231 West 110th Street (See Ex. A, Abst. 71, Bongiorno).

[61] Ex. A, Abst. 73, 153 (Officers Bongiorno and O'Malley, State's Witnesses).

[62] Ex. A, Abst. 79 (Officer Bongiorno, State's Witness).

[63] Ex. A, Abst. 79 (Officer Bongiorno, State's Witness).

"Police Department" to a "squad room" on the same floor."

Officer Bongiorno remained with petitioner "continuously" from 5:30 A.M. until 11:00 A.M.[66] Lt. McMahon, Commanding Officer of the Homicide Detail, and Lieutenant Olson, chief investigator of the State's Attorney's office, spent time with petitioner during this period, also.[67] First Assistant State's Attorney Austin was interrogating petitioner at 9:00 A.M. in the "squad room."[68]

Petitioner was placed on exhibition in a "line-up" at one point during the morning.[69]

Shortly before 11:00 A.M., petitioner was removed to the office of Lieutenant Olson. Prosecutor Bloch was present.[70]

Between 1:00 and 1:45 P.M., petitioner arrived at the office of Prosecutor Austin for further interrogation.[71] At 1:45 Prosecutor Austin commenced taking a "joint statement" from petifioner and the suspect Eugene Taylor.[72] Prosecutor Bloch, Captain Reynolds, Chief O'Malley, Lieutenant Olson, Officer McLaren, and Officer Walsh were also

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[66] Ex. A, Abst. 79 (Officer Bongiorno, State's Witness).

[67] Ex. A, Abst. 79 (Officer Bongiorno, State's Witness).

[68] Ex. A, Abst. 156 (Lt. McMahon, State's Witness); Ex. A, Abst. 192, 193-94 (Capt. Olson, State's Witness).

[69] Ex. A, Abst. 434 (Prosecutor Austin, State's Witness).

[70] Ex. A, Abst. 146 (Prosecutor Bloch, State's Witness); Ex. A, Abst. 433 (Prosecutor Austin, State's Witness); Ex. A, Abst. 293 (Mr. Rusch, State's Witness); Ex. A, Abst. 333 (Mr. Czub, State's Witness); Ex. A, Abst. 378 (Mrs. Morrissey, State's Witness).

[71] Ex. A, Abst. 144 (Prosecutor Bloch, State's Witness).

[72] Ex. A, Abst. 84-85 (Officer McLaren, State's Witness).

[73] Ex. A, Abst. 432 (Prosecutor Austin, State's Witness); Ex. A, Abst. 400 (Court Reporter Erickson, State's Witness).

present.[73] A court reporter employed by the State's Attorney's office was present, and took the joint statement down in shorthand."

Petitioner was not cautioned in any way, by anyone, as to his right not to make a statement, either prior to, during, or at the conclusion of this "joint confession." The relevant testimony is as follows:

> Question [By Prosecutor Cooney]: ". . . Can you tell this jury of ladies and gentlemen, if you know, Sir, what you said to Paul Crump before he made that first statement?"
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> • • •
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> The Court: "It was on the 26th of March, 1953, at approximately 1:45 P.M. as I understand it."
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> • • •
>
> Answer [By Mr. Austin]: "I told him that we knew that he had been identified by three or four people that morning in a show-up. He knew that he had been implicated in this affair by Hudson Tillman and he knew that the hat that had been found at the scene fitted him, and I asked him if, in view of the, his knowledge of those things, whether or not he wished to make a statement regarding his participation in this robbery and killing, and he said he did."[74]

The transcript of the "joint confession" similarly reveals that no cautionary statement was made by the interrogator after he and his quarry went "on the record."[75]

After the "joint statement" was taken, a typewritten transcription of Mr. Erickson's shorthand notes was prepared. However, Prosecutor Austin was not satisfied with the "joint statement." He concluded that the "joint state-

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[73] Ex. A, Abst. 465 (People's Exhibit 22, in evidence).

[74] Ex. A, Abst. 175-176 (Court Reporter Erickson, State's Witness).

[75] Ex. A, Abst. 432-33 (Prosecutor Austin, State's Witness).

[76] Ex. A, Abst. 465-91 (State's Exhibit 22 in evidence).

ment" did not represent the truth.[77] Prosecutor Austin therefore decided that petitioner and the other suspects should not be given an opportunity to sign their confessions.[78] Therefore, Austin never asked petitioner to sign his first confession,[79] although the statement was received in evidence against petitioner at his trial.[80]

Between 2:00 and 3:30 P.M., petitioner was once again being exhibited in show-ups at the State's Attorney's office.[81]

Throughout the day, between show-ups, the police and prosecutors "steadily" interrogated petitioner.[81a]

The Seventh Night:

At 5:30 P.M., petitioner and Eugene Taylor were removed from the State's Attorney's office for the night.[82]

At 6:30 P.M., the prisoners arrived at the Stockyards Station and were placed in cells there. Petitioner was fed.[83]

By 7:30 P.M., a special guard had been posted outside petitioner's cell.[84] A second special guard took over at midnight, and maintained the vigil until 8:00 A.M.[85]

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[77] Ex. A, Abst, 183 (Prosecutor Austin, State's Witness).
[78] Ex. A, Abst. 434 (Prosecutor Austin, State's Witness).
[79] Ex. A, Abst. 183 (Prosecutor Austin, State's Witness).
[80] Ex. A, Abst. 464, 465-91 (State's Exhibit 22 in evidence).
[81] Ex. A, Abst. 100 (Officer Doyle, State's Witness), Abst. 31 (Crump).
[81a] Ex. A, Abst. 30-31 (Crump).
[82] Ex. A, Abst. 167 (Officer Rock, State's Witness).
[83] Ex. A, Abst. 163 (Officer Hahn, State's Witness).
[84] Ex. A, Abst. 164 (Officer Oklapek, State's Witness).
[85] Ex. A, Abst. 165 (Officer Bykowski, State's Witness).

The special guards were there to enforce orders that petitioner not be permitted to talk to or have any contact with any other person.[86]

The Seventh Day:

From 8:00 A.M. to 10:00 A.M., on Friday, March 27, petitioner was still being held "open" at the Stockyards Police Station. Petitioner was still "marked open" on the police books. That "means nobody can talk to him."[87]

At some point prior to 10:00 A.M., Captain Reynolds had petitioner removed from his cell and taken to an office in the Stockyards Police Station. Petitioner's interrogation resumed.[88]

At about 10:00 A.M., petitioner was returned to the State's Attorney's office.[89]

At about 10:00 A.M., Prosecutor Austin began to question petitioner. Petitioner was alone with Mr. Austin. Petitioner asked Mr. Austin for permission to speak with his attorney. He told Austin the name of his attorney, one William Gerber. Austin telephoned Gerber. This took place some time after 11:00 A.M.[90]

Austin told Gerber that petitioner had "indicated that he would say nothing further until he had an opportunity to talk with his lawyer."[91]

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[86] Ex. A, Abst. 165 (Officer Bykowski, State's Witness).

[87] Ex. A, Abst. 166, 167 (Officer Guinane, State's Witness).

[88] Ex. A, Abst. 174 (Capt. Reynolds, State's Witness).

[89] Ex. A, Abst. 168 (Officer Rock, State's Witness).

[90] Ex. A, Abst. 31-32 (Crump); Ex. A, Abst. 180, Ex. B, Abst. 715 (Prosecutor Austin, State's Witness).

[91] Ex. B, Abst. 715 (Prosecutor Austin, State's Witness). Trans. 198 (Crump).

At about noon, Attorney Gerber was given access to petitioner.[92] When Mr. Gerber arrived, Prosecutor Austin left the room. He paced back and forth in the corridor, looking in on Gerber and petitioner through the open door to his office, as he passed it.[93] Captain Reynolds stood in the doorway, observing the conference.[94]

Petitioner conferred with Mr. Gerber for approximately 15 minutes.[95] (According to the uncontradicted testimony of Mr. Gerber at the District Court habeas corpus hearing, it appears that a recording machine was secreted in Mr. Austin's office.[96]) Then Gerber called Austin back into the office where he and petitioner were seated. Gerber then stated to Austin: "I have instructed my client to refuse to say anything unless I am present."[97] Gerber then turned to his client and said: "Paul, if they ask you what time of day it is, don't tell them. Just say that you have to wait until you see your lawyer."[98] Austin said nothing.[99]

Gerber said, "I'll see you fellows later," and started for the door.[100]

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[92] Ex. A, Abst. 33 (Crump); Ex. A, Abst. 435 (Prosecutor Austin, State's Witness).

[93] Ex. A, Abst. 181 (Prosecutor Austin, State's Witness).

[94] Ex. B, Abst. 717 (Prosecutor Austin, State's Witness).

[95] Ex. A, Abst. 59 (Crump).

[96] Trans. 193 (Attorney Gerber, Defense Witness). When Mr. Gerber attempted to cross-examine Mr. Austin about this recording device at petitioner's first trial, the trial judge cut him off. Ex. B, Abst. 718-19 (Prosecutor Austin, State's Witness).

[97] Ex. A, Abst. 181 (Prosecutor Austin, State's Witness); Trans. 185-86 (Attorney Gerber, Defense Witness).

[98] Trans. 202 (Crump).

[99] Trans. 186 (Attorney Gerber, Defense Witness).

[100] Trans. 202 (Crump).

"As we walked out of the door I believe it was between the first assistant's door and the outer door, [Austin] said, 'I will call you if there is any further statements to be taken.'" [101]

Petitioner was then removed from the office of Prosecutor Austin and taken down to an establishment on the second floor known as the "Sex Bureau Lockup Room." [102] He was accompanied by three of the other suspects in the stockyards killing, and about five officers. [103] The prisoners were placed in chairs arranged around a large

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[101] Trans. 186 (Attorney Gerber, Defense Witness).

The Court of Appeals thought that this testimony was controverted, remarking with regard to this statement by Mr. Gerber, that:

> "There is no evidence to this effect in the second trial which resulted in the challenged conviction. The relator, however, did testify as to an alleged agreement by Austin in the first trial. Austin denied the existence of any such agreement." 295 F.2d at 700.

This statement is completely misleading. The relevant testimony by Mr. Austin at the first trial, is, in its entirety, as follows (Ex. B, Abst. 707):

> Q. Did you at any time agree for David and Eugene Taylor and Paul Crump not to answer questions that might be put to them?
>
> A. I didn't agree. They told me and Mr. Gerber told me that he had instructed them not to answer questions and indicated that they had told him that they would comply with his instructions, but I, at no time agreed that they should not.

This testimony that Austin did not agree to refrain from putting questions to petitioner in no way controverts Attorney Gerber's testimony that Austin said he would "call" him if "any further statements [were] to be taken."

See also, Ex. A, 545 (Crump).

[102] Ex. A, Abst. 33 (Crump).

[103] Ex. A, Abst. 33 (Crump).

round table.[104] They were handcuffed to the chairs.[105] The interrogation continued through the afternoon and into the evening.[106] It appears that Chief of Detectives O'Malley may have stopped in on several occasions.[107] The "questioning continued all the time."[108]

The Eighth Night:

At about 10:00 P.M., Petitioner was returned to the office of Prosecutor Austin, and Austin began interrogating him.[109] At 10:30 P.M.,[110] Prosecutor Austin went "on the record;" he commenced taking a statement from petitioner in the presence of Prosecutor Bloch,[111] Chief O'Malley,[112] Lieutenant McMahon,[113] Captain Reynolds,[114] and Court Reporter Erickson.[115] Also present were three of the other suspects in the stockyards killing.[116]

At this point, petitioner stated that he did not wish to make a statement until he was permitted to talk with his attorney, Mr. Gerber.[117] (According to Prosecutor Bloch,

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[104] Ex. A, Abst. 545 (Crump).

[105] Ex. A, Abst. 33 (Crump).

[106] Ex. A, Abst. 545-46 (Crump).

[107] Ex. A, Abst. 153 (Chief O'Malley, State's Witness).

[108] Trans. 206 (Crump).

Later on in the afternoon two of the prisoners were taken to Court. Ex. B, Abst. 682 (Mr. Sommerfeld, State's Witness). But petitioner remained behind. Ibid.

[109] Ex. A, Abst. 179 (Prosecutor Austin, State's Witness).

[110] Ex. A, Abst. 500 (State's Exhibit 23, in evidence).

[111] Ex. A, Abst. 143-144, 146 (Prosecutor Bloch, State's Witness).

[112] Ex. A, Abst. 153 (Chief O'Malley, State's Witness).

[113] Ex. A, Abst. 155 (Lt. McMahon, State's Witness).

[114] Ex. A, Abst. 170 (Capt. Reynolds, State's Witness).

[115] Ex. A, Abst. 177 (Mr. Erickson, State's Witness).

[116] Ex. A, Abst. 35 (Crump).

[117] Ex. A, Abst. 36 (Crump).

petitioner said "something" prior to making his confession on this occasion, but Bloch could not remember what it was that petitioner had said.[118] "There were utterances made" that the court reporter "did not take notes on" during the Friday evening session.)[119]

Petitioner was not cautioned, in any way, by anyone, as to his right not to make a statement, either prior to, during, or at the conclusion of this, his second confession. The relevant testimony is as follows:

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[118] Ex. A, Abst. 152 (Prosecutor Bloch, State's Witness).

[119] Ex. A, Abst. 177 (Court Reporter Erickson, State's Witness).

At this critical point in the record, the Court of Appeals once again implies that the key testimony is controverted, when, in fact, it is not. The opinion below states (295 F.2d at 700):

> "[Relator's] . . . testimony in the state criminal proceeding . . . mentions only two requests [for counsel]: the first request (which Austin honored when he called Gerber) and the second request which led to the alleged statements [by Austin], that Gerber was in jail, which is disputed by Austin's testimony."

This is utterly misleading. Austin did deny that he had told petitioner that Gerber was in jail at the time petitioner asked to see him:

> "Never did I say, 'Your lawyer, Mr. Gerber, is in jail for consorting with criminals', or words to that effect." Ex. A, Abst. 614 (Prosecutor Austin, State's Witness).

And Austin did deny that petitioner made any request to talk with his attorney on the **previous** day, Thursday, March 26, 1953. See Ex. A, Abst. 185. But Austin **never** denied that petitioner asked to see Gerber on Friday night, (although Austin took the stand three separate times after petitioner's testimony on this point) and no one else has ever denied it either.

All we have is petitioner's uncontradicted testimony that he did ask to see Gerber, and the hazy recollection of Prosecutor Bloch that petitioner said "something" before the session went "on the record." Of course, no impartial observers were present.

QUESTION [By Prosecutor Cooney]: "Do you recall if anything was said to him before the statement was taken the following day at 10:30 p.m.?"
ANSWER [By Mr. Austin]: "I do."
QUESTION: "Would you tell the ladies and gentlemen what you said to him at that time, sir."
ANSWER: "As he was brought into the office of the State's Attorney, I advised him of what I, or I told him that Eugene Taylor, David Taylor and Harold Riggins had just completed making statements regarding their participation in this robbery at the Libby, McNeill plant, and asked him if, in view of that, he too wished to make a statement regarding his participation, and he said he did."[120]

The transcript of the second confession similarly reveals that no cautionary statement was made by the interrogator after he and his quarry went "on the record."[121]

Petitioner's confession took "15 or 20" minutes.[122]

At this point, Prosecutor Bloch knew that petitioner was to be charged with the stockyards murder.[123]

Petitioner was, upon completion of his statement, sent to the County Jail to spend the night in the "witness detention quarters" there.[124]

Petitioner remained in the "witness quarters" under special guard for the remainder of the night. He slept all night.[125]

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[120] Ex. A, Abst. 433 (Prosecutor Austin, State's Witness).
[121] Ex. A, Abst. 500-518 (State's Exhibit 23 in evidence).
[122] Ex. A, Abst. 52 (Crump).
[123] Ex. A, Abst. 146 (Prosecutor Bloch, State's Witness).
[124] Ex. A, Abst. 213 (Officer Piotrowski, State's Witness).
[125] Ex. A, Abst. 210, 213-14 (Officers Moore and Piotrowski, State's Witnesses).

Petitioner's attorney, Mr. Gerber, was in the Criminal Courts Building on Friday afternoon.[126] He was in the building every day. He did not leave the city.[127] Mr. Austin did not call him.[128]

The Eighth Day:

A little before 10:00 A.M. on Saturday, March 28, 1953, petitioner and his four fellow defendants were ushered into the office of Mr. John Gutknecht, the State's Attorney of Cook County.[129] Present were a large number of police officers and prosecutors.[130]

Also present were a number of prominent civilians who had been called in from all over Chicago for the purpose of witnessing the signature ceremony which was about to take place. Among them were a steel executive,[131] a socially prominent lady who was a former member of the Chicago Board of Education from "way up" on the North Side of Chicago,[132] the personal physician to State's Attorney Gutknecht,[133] and an attorney who was an old friend and former pupil of Mr. Gutknecht.[134] The purpose of calling in this "jury" of impartial observers was to fortify the State's case against "claims of duress" which might be "frivolously made" by the defendants.[135] Altogether, between 20 and 40 onlookers were present.[136]

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[126] Ex. B, Abst. 682 (Mr. Sommerfeld, State's Witness).
[127] Trans. 186 (Attorney Gerber, Defense Witness).
[128] Trans. 187 (Attorney Gerber, Defense Witness).
[129] Ex. A, Abst. 103 (Mr. Megan, State's Witness).
[130] Ex. A, Abst. 148 (Prosecutor Bloch, State's Witness).
[131] Ex. A, Abst. 103 (Mr. Megan, State's Witness).
[132] Ex. A, Abst. 190-91 (Mrs. Mellin, State's Witness).
[133] Ex. A, Abst. 120, 123 (Dr. Brams, State's Witness).
[134] Ex. A, Abst. 203, 208 (Mr. Owens, State's Witness).
[135] Ex. A, Abst. 149-50 (Prosecutor Bloch, State's Witness).
[136] Ex. A, Abst. 127 (Dr. Brams, State's Witness).

Petitioner's attorney was not called or notified, and so he was not present at the ceremony.[137]

Petitioner's second confession was read to him. He signed. The first "erroneous" confession does not appear to have been mentioned.[138]

One of the defendants, Riggins, refused to sign.[139]

Dr. Brams examined the defendants after the ceremony, and found no marks on their bodies.[140]

After Dr. Brams' examination, petitioner was transported to an inquest at the County Morgue. He did not testify.[141]

Postscript:

On March 30, a physician examined petitioner in the County Jail. He noted a "recent abrasion" on petitioner's left hand and on his right elbow. Petitioner was complaining of numbness and burning in his hands.[142]

On March 31, 1953, petitioner was indicted.[143] It appears that he had been taken before a Judge for the first time on the day before.[144]

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[137] Trans. 185-87 (Attorney Gerber, Defense Witness).

[138] Ex. A, Abst. 203 (Attorney Owens, State's Witness).

[139] Ex. B, Abst. 328 (Riggins, Defense Witness).

[140] Ex. A, Abst. 123 (Dr. Brams, State's Witness).
Interestingly, Dr. Brams had been alerted to stand by for his appearance at the ceremony "several days" before—this apparently was prior to the time that any confession had been obtained. Ex. A, Abst. 124 (Dr. Brams, State's Witness).

[141] Ex. A, Abst. 39 (Crump).

[142] Ex. A, Abst. 189 (Record Clerk Banco, Defense Witness); Ex. A, Abst. 550-51 (Dr. Telser, Defense Witness).

[143] Ex. A, Abst. 1.

[144] Trans. 162-72.

D. THE CONTROVERTED FACTS:

As is usual in cases where an accused has been held incommunicado by the police for a long time, petitioner has testified at both of his trials to a harrowing story of physical punishment at the hands of his captors. As is usual in such cases, each and every one of the police officers involved has denied each and every charge of brutality. There the matter rests. No impartial observers were present.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts in principle with the rationale of the majority, and conflicts squarely with the dissent, in *Crooker* v. *California*, 357 U.S. 433 (1958). Stated abstractly, the questions presented here are the same as those to which the grant of certiorari was limited in *Crooker*. See the quotation, 357 U.S. at 434 n. 1. But the context in which these questions are raised is decisively different here. In *Crooker* the circumstances of the police interrogation were so fundamentally fair that the defendant's attorneys were reduced to the contention that a pre-confession denial of counsel in a capital case violated due process "*without regard to the circumstances of the case.*" 357 U.S. at 440 (The italics are this Court's). That is not this case.

The differences between *Crooker* and this case are decisive:

Crooker was a 31 year old college graduate who had completed his first year of law school. Petitioner was a 22 year old Negro who had not completed high school.

Fourteen hours elapsed between Crooker's arrest and his confession. Petitioner was arrested, held over 60 hours, and released. He was sick and running a fever.

At the time of his second arrest, 2½ days later, petitioner's fever was 103.6. Instead of receiving medical treatment, petitioner was subjected to two all-day sieges of interrogation. He was held for over 53 hours before he signed his second confession.

The circumstances here go far beyond the circumstances of *Crooker*.

2. This case presents the issue which was presented, but not decided, in *Spano* v. *New York*, 360 U.S. 315, 320 (1959). The decision below conflicts in principle with the position of the concurring Justices in *Spano*. See 360 U.S. at 324 and 326.

The serious threat to the right to counsel in a capital case which is posed by the decision below, is highlighted by comparing it with a very recent decision of the Illinois Supreme Court. In *People* v. *Jackson*, 178 N.E. 2d 310 (1961) the Illinois Supreme Court held that a defendant in a capital case who was brought before a magistrate without counsel, and who proceeded to confess his guilt in open court, could not be convicted on the basis of this confession because he was not represented by an attorney at the time he made it. It therefore appears, that had petitioner in this case been brought immediately to court and made a full confession in open court before an impartial judge, his conviction would have been reversed. But at the same time, it appears that the State of Illinois and the Court below have taken the position that the same confession taken after days and nights of interrogation and incommunicado detention *can* be used so long as it is taken in the secrecy of a prosecutor's office or police lockup.

The result in the *Jackson* case creates an ominous situation in criminal law enforcement in Illinois. The police are now informed that if they take a prisoner to court and the prisoner is thus enabled to make his confession in the full light of day under all the safeguards which a proceeding in open court provides, the confession cannot be used if the defendant is not represented by an attorney at the time he confesses. On the other hand, the police are now informed by the decision below that if they obtain a confession *in secret* from an uncounseled defendant, they are free to use that confession so long as they deny that they beat their prisoner in order to secure it.

3. The decision below conflicts in principle with the majority opinion in *Spano* v. *New York*, 360 U.S. 315 (1959).

The majority in *Spano* held that the defendant's confession was coerced "by official pressure, fatigue and sympathy falsely aroused . . ." 360 U.S. at 323. Petitioner was held far longer and he was subjected to a far more grueling interrogation than was the defendant in *Spano*. Petitioner's confessions were the product of psychological coercion, and their use in evidence against him was therefore a violation of the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

DONALD PAGE MOORE,
Attorney for Petitioner

APPENDIX A.

OPINION OF THE COURT OF APPEALS

United States of America ex rel.
Paul Crump, Petitioner-
Appellant,

v.

Frank G. Sain, Sheriff of Cook County,
Illinois, Respondent-Appellee.

No. 13287.

United States Court of Appeals
Seventh Circuit.

Oct. 16, 1961.

Rehearing Denied Nov. 14, 1961.

Before Hastings, Chief Judge, and Duffy and Schnackenberg, Circuit Judges.

Schnackenberg, Circuit Judge.

After reversal and remandment for proceedings consistent with our opinion of March 20, 1959, United States ex rel. Crump v. Sain, Sheriff, 264 F.2d 424, the district court permitted relator Paul Crump to file an amended petition, which Frank G. Sain, sheriff of Cook County, Illinois, respondent, answered. That answer included the production of the entire record of the Supreme Court of Illinois in causes Nos. 33334 and 34225, adjudicating the

contentions of relator, and reported in People v. Crump, 5 Ill. 2d 251, 125 N.E.2d 615, 52 A.L.R. 2d 834, and 12 Ill.2d 402, 147 N.E.2d 76, respectively. A hearing was had, during which the district court heard the testimony of relator and William P. Gerber, his attorney.

The court entered findings of fact and conclusions of law, and dismissed the petition. The court found specifically that relator's confession was given "freely and voluntarily." Relator appealed.

The record shows what we now relate.

On March 20, 1953, a guard in a stockyards plant was killed during a robbery. The same day, Chicago police officers arrested relator and he was questioned for three days and then was released, through the efforts of his lawyer, attorney William Gerber of the Illinois bar. On March 26, 1953, ten police officers went to relator's home and arrested him without a warrant. He was taken to the criminal court building in Chicago. A stop was made at a restaurant where coffee and a doughnut were purchased for relator. He appeared in a "lineup" that morning, was questioned by an assistant state's attorney and remained overnight at a police station.

On the morning of March 27 he was returned to the criminal court building, and was again questioned with another suspect, Eugene Taylor. Although Taylor admitted some part in the robbery, relator denied any implication. About noon, relator was in the office of first assistant state's attorney Richard Austin. Relator told Austin that he wanted to confer with his lawyer, Gerber, who was known to Austin. After the latter called Gerber's office, he told relator that Gerber was on his way. They waited in the office alone until Gerber's arrival, whereupon Austin left his office to Gerber and relator for about an hour and a half for a conference. Gerber had handled some legal matters for relator's family, and he represented relator in the first trial of this case.

Both upon his motion to suppress and upon the second trial of his case, relator testified that, after his private

meeting with Gerber in Austin's office, relator summarized in the presence of Austin and two or three police officers, his attorney's advice to him on that occasion, as follows:

> "Well, they came into the room, and Mr. Gerber addressed me in front of those men I have named. And he told them, 'Now, Dick, you hear this. I am advising my client not to say anything to anyone except upon my advice.' And he told me, he says, 'Paul, and if anyone asks you for a match, you tell them you can't give it to them unless you have the advice of your counsel.' He said, 'Do you understand?' I said, 'Yes, sir.' And he asked Mr. Austin and the rest of them did they understand it. They said, yes. Then he walked out."

In the proceedings in the district court, Gerber testified that Austin said:

> "I will call you if there is [*sic*] any further statements to be taken."

There is no evidence to this effect in the second trial, which resulted in the challenged conviction. The relator, however, did testify as to an alleged agreement by Austin in the first trial. Austin denied the existence of any such agreement.

Thereafter relator was taken to the lockup room where he remained until 10:30 p.m. At this time, according to relator's testimony at his second trial, he requested to see his attorney but Austin told him that Gerber was "in jail for consorting with criminals".[1] He also testified that Eugene Taylor told him the same thing. On cross-examination on the motion to suppress, the relator testified that he believed he told Austin that he did not want to say anything until he saw his lawyer. During re-cross-examination on the second trial he testified that he believed Austin said his lawyer was in jail for consorting with criminals.

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[1] This jargon may have some meaning to those possessing expertise in jail circles. We do not pursue it.

On the trial, Austin denied that he made any such statement.

On the other hand, at his first trial, relator did not attribute to Austin this statement about Gerber's being in jail for consorting with criminals. He stated that either Gene or David Taylor made this statement about Gerber.

According to relator's testimony, Austin said he had a warrant for the arrest of relator's wife for an "active part in the preparation of this", and that is when relator "started talking." At the second trial Austin, in testifying, denied making such a statement.

During the course of the federal habeas corpus proceeding, relator insisted that he had requested innumerable times that he see his attorney. His own testimony in the state criminal proceeding, however, mentions only two requests: the first request (which Austin honored when he called Gerber), and the second request which led to the alleged statement that Gerber was in jail, which is disputed by Austin's testimony.

Relator confessed orally to Austin the night of March 27. Thereafter he slept in the witness quarters of the county jail building. The following morning, March 28th, relator had breakfast in the administrative building of the county jail. He signed a statement at the state's attorney's office on that morning in the presence of a number of disinterested outsiders.

When admitted to the county jail, relator was given a physical examination by Dr. Stanley E. Telser, the examining physician, who found old scars on various parts of the body and a small abrasion on the left hand.

On the morning relator signed the confession, he was examined by Dr. William A. Brams, to whom he made no complaints about his condition or any type of physical injury. Dr. Brams testified that Austin asked relator how he had been treated while in custody and relator answered that he was well-treated. It was then that Dr. Brams had relator remove his clothes, made a complete physical ex-

amination, looking for areas of tenderness or marks of recent violence or physical injury, and found none. Dr. Brams testified that he found no welts nor marks of violence or injury and no bruises except old ones.

The district court conducted a hearing, pursuant to our remandment of this case, to determine the facts. As a result thereof the court made findings of fact including one that relator's confession was given freely and voluntarily. The court had before it, not only the complete documentary report of the state court proceedings, but also the relator and his attorney testifying in open court. Inasmuch as most of the questions arising upon the record before us involve the credibility of witnesses, the determination of the district court upon these issues of fact is highly persuasive in our disposition of this appeal.

[1] Section 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is applicable to habeas corpus proceedings. Farrell v. Lanagan, 1 Cir., 166 F.2d 845, certiorari denied, 334 U.S. 853, 68 S.Ct. 1509, 92 L.Ed. 1775; Rushing v. Wilkinson, 5 Cir., 272 F.2d 633, certiorari denied, 364 U.S. 914, 81 S.Ct. 280, 5 L.Ed. 2d 229. Thus the requirement of rule 52(a) that a trial judge's findings are reversible only if clearly erroneous is applicable to this case.

[2] It cannot be successfully maintained that the weight to be given findings of fact by the district court under rule 52(a) is less because of the argument made here that there existed a "totality of circumstances which produced the confession".[2] The use of this comprehensive phrase cannot avert a consideration of the evidence of proven facts. Such evidence is subject to the same tests

[2] As stated in relator's brief, he urges: (a) the appellant was held incommunicado; (b) his arraignment was delayed in violation of the laws of Illinois; (c) his lawyer's counsel was circumvented; (d) he was ill when he was arrested without a warrant in the middle of the night and had been running a high fever; (e) he was kept without food during his long detention until after he confessed.

as to credibility, materiality and relevancy as other evidence.

We are however led to give particular attention to relator's charge: "His lawyer's counsel was circumvented." Although little argument in this court has been directed to this aspect of the case, the charge is implicit that assistant state's attorney Austin infringed upon relator's right to counsel. While, in view of Austin's denial of relator's charges, supported by the finding of the district court, we might well not discuss the matter further, we shall do so. The cases are legion where the repeated demands for counsel by a person in custody are refused by law officers. By contrast, in this case, when relator asked for Gerber, who was his family's attorney, Austin in relator's presence telephoned Gerber's office and relayed the request, which was immediately complied with by Gerber. When the latter came, Austin's office was surrendered to Gerber and relator for a lengthy private conference. Thereafter, despite Gerber's advice to relator not to make any statement of any kind without consulting him, relator, evidently in disregard of his lawyer's instructions, made a full confession. There is no contention that relator was a minor or of weak mentality. He had been a high school student. Why he decided to proceed as he did was his own affair. No authority has been cited, and we are not prepared to hold, that under these circumstances the state's attorney became a guardian or representative of the accused. Having demonstrated as people's counsel an eminent fairness to relator in putting him into conference with his own personally chosen lawyer, Austin's paramount duty as a prosecutor reasserted itself and he and the relator were meeting at arm's length. We find no overreaching which contributed to the making of the confession.

However, in the face of the foregoing facts, established affirmatively by the record in this case, relator's counsel frankly asks us to surmise what occurred between the afternoon of March 27th, when relator summarized Gerber's instructions, and 10:30 that evening. His counsel now asks "of what possible legal effect was the presence of counsel

when it was followed by ten hours of custody by police?" If the record contained any showing of police brutality or other misconduct during that period, such an inquiry would be pertinent. There is none, either from the mouth of relator when a witness in the district court or otherwise. On the record before us this question is asked in a vacuum.

In this court relator relies upon the fourteenth amendment to the Constitution of the United States. He cites Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735; 5 L.Ed. 2d 760; Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed. 2d 948; Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037.

In Crooker v. California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448, a conviction for murder was affirmed, although certiorari had been granted by the Supreme Court because of the serious due process implications that attend state denial of a request to employ an attorney. Our comparison of the facts in Crooker with those in the case at bar convinces us that relator's constitutional rights were not violated in this respect. Moreover, it was pointed out, 357 U.S. at page 437, 78 S.Ct. at page 1290, in Crooker that there was there involved a failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. The court held that this bare fact does not render involuntary a confession by the one so detained, citing Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed2d 246.

Crooker was followed by Cicenia v. Lagay, 357 U.S. 504, at page 509, 78 S.Ct. 1297, at page 1300, 2 L.Ed.2d 1523, where the court said:

> "In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel. Even in federal prosecutions this Court has refrained

from laying down any such inflexible rule. See McNabb v. United States, supra [318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819]; Mallory v. United States, 354 U.S. 449 [77 S.Ct. 1356, 1 L.Ed.2d 1479]. Still less should we impose this standard on each of the 48 States as a matter of constitutional compulsion. It is well known that law-enforcement problems vary widely from State to State, as well as among different communities within the same State. This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.' Hoag v. New Jersey, 356 U.S. 464, 468 [78 S.Ct. 829, 833, 2 L.Ed.2d 913]. See Maxwell v. Dow, 176 U.S. 581 [20 S. Ct. 448, 44 L.Ed. 597]; Twining v. New Jersey, 211 U.S. 78 [29 S.Ct. 14, 53 L.Ed. 97]. The broad rule sought here and in Crooker would require us to apply the Fourteenth Amendment in a manner which would be foreign both to the spirit in which it was conceived and the way in which it has been implemented by this Court."

For the reasons herein set forth, we find no error in the proceedings and entry of the order of the district court on November 28, 1960 dismissing the petition for a writ of habeas corpus herein and we hereby affirm said order as the final judgment of said court in said cause.

Affirmed.

APPENDIX B.

JUDGMENT OF THE COURT OF APPEALS.

* * *

[CAPTION]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court entered therein on November 23, 1960, dismissing the Petition for a Writ of Habeas Corpus be, and the same is hereby, affirmed as the final judgment of said Court on this cause, in accordance with the opinion of this Court filed this day.

Entered October 16, 1961.

* * *

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

* * *

[CAPTION]

It is hereby ordered by the Court that the Motion of Respondent-Appellee for leave to file instanter his reply to Petition for Rehearing be, and the same is hereby, granted.

It is further ordered by the Court that the Petition for Rehearing filed herein by Petitioner-Appellant be, and the same is hereby, denied.

Entered November 14, 1961.

APPENDIX C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

In The United States District Court.
Northern District of Illinois—Eastern Division.

United States of America, ex rel., Paul Crump, *Petitioner*, v. Frank G. Sain, Sheriff of Cook County, Illinois, *Respondent*.	No. 58 C 1280.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court, having carefully examined and considered the pleadings, exhibits and evidence, and the arguments of counsel, hereby makes its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT.

1. It has jurisdiction of the parties and of the subject matter.

2. Paul Crump, petitioner herein, is held and detained by Frank G. Sain, Sheriff of Cook County, Illinois, respondent herein, under and by virtue of a judgment and sentence of death, issued from the Criminal Court of Cook County, State of Illinois.

3. The record of the entire state court proceeding is entitled *People* v. *Crump*, Supreme Court of Illinois, No. 34225. The respondent has filed this record in this Court and has incorporated it as an exhibit to his Answer. This Court has read the entire state court record and has carefully studied the contents thereof. William P. Gerber, an attorney, and the petitioner testified in this federal Court

proceeding on behalf of the petitioner. The respondent presented no testimony.

Within the twenty-four hour period immediately prior to the signing of the challenged written confession by the petitioner at the State's Attorney's office, Richard Austin, First Assistant State's Attorney of Cook County, Illinois, in response to the petitioner's request, notified the said attorney, William P. Gerber, that the petitioner desired to speak with him. Upon Mr. Gerber's arrival at the office of the State's Attorney, he was provided with an office where he conferred with the petitioner, privately and without hindrance. Mr. Gerber did advise the petitioner not to say anything further unless he was present. The records of the state court proceeding disclose that the petitioner testified in a judicial proceeding in the Criminal Court of Cook County that he had not received any ill treatment while he was in the State's Attorney's Office.

The material allegations of the petition, relating to the question of the voluntary nature of the challenged confession, were fairly raised and fully explored in the state court proceedings, as disclosed by the state court records. They were reviewed and carefully considered by the Supreme Court of Illinois. *People* v. *Crump*, 12 Ill. 2d 402. A petition for *certiorari* was denied by the Supreme Court of the United States. *Crump* v. *Illinois*, 357 U.S. 906.

The petitioner's rights under the federal Due Process Clause and his asserted claim thereunder were accorded full and fair consideration in the state court proceedings.

On the basis of the state court record and of the testimony in this Court, the determination of the state court that the challenged confession was given freely and voluntarily by the petitioner and that there was no denial of federal due process of law is correct. The challenged confession was given by the petitioner freely and voluntarily.

4. There is no evidence that the State's Attorney of Cook County procured any witnesses to testify falsely against the petitioner.

5. There is no evidence that the State's Attorney of Cook County procured the suppression of any evidence.

6. There is no evidence that the attorneys of the office of the State's Attorney of Cook County conspired with officers of the Chicago Police Department and employees of the firm of Libby, McNeill and Libby to obtain a confession from the petitioner by illegal means.

7. The defendant was taken into custody at 4:00 A.M. on March 26, 1953 and the arrest slip was issued on March 28, 1953.

CONCLUSIONS OF LAW.

1. It has jurisdiction of the parties and of the subject matter.

2. The petitioner's rights, with reference to the challenged confession, under the federal Due Process Clause and the claim which he asserts thereunder were accorded full and fair consideration in the state court proceedings.

3. The challenged confession was given freely and voluntarily by the petitioner, and the petitioner did not suffer any denial of due process of law.

4. The State's Attorney of Cook County did not procure any witnesses to testify falsely against the petitioner.

5. The State's Attorney of Cook County did not procure the suppression of any evidence.

6. The attorneys of the office of the State's Attorney of Cook County did not conspire with officers of the Chicago Police Department and employees of the firm of Libby, McNeill and Libby to obtain a confession from the petitioner by illegal means.

7. The petitioner is lawfully imprisoned and detained by the respondent by virtue of a valid judgment and sentence of death, issued from the Criminal Court of Cook County, State of Illinois. The writ, heretofore issued, must be quashed and petition must be dismissed and the petitioner must be remanded to the custody of the respondent.

November 3, 1960 ENTER:

/s/ J. S. Perry

Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 717

PAUL CRUMP,

Petitioner,

vs.

FRANK G. SAIN, SHERIFF,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1961

No.

PAUL CRUMP,

Petitioner,

vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

As a matter of federal law, is a confession to be held involuntary and inadmissible in a State court criminal proceeding where the record indisputably shows that, within the twenty-four hour period prior to any oral admissions or the signing of any written confession, the prosecuting official immediately honored the petitioner's request to see his lawyer and arranged for the private consultation, which lasted from fifteen to forty-five minutes without any hindrance or interference from the prosecuting authorities and which resulted in the express admonition to the petitioner

that he make no statement and, further, where the record shows that the petitioner testified that he was well treated in the office of the prosecuting official?

STATEMENT[1]

This *habeas corpus* action was originally filed in the United States District Court on July 11, 1958 where it was dismissed for want of jurisdiction. On appeal, the United States Court of Appeals for the Seventh Circuit reversed the order of dismissal and remanded the cause to the lower court. *United States of America ex rel. Crump* v. *Sain* (7 Cir., 1959), 264 F. 2d 424. Thereafter, the trial court ordered the writ to issue on December 24, 1959. A hearing was had in the trial court on May 25, 1960 (Tr. 157-219) wherein William P. Gerber, an attorney, and the petitioner testified. The respondent offered no testimony. The exhibit to his answer consists of the record of the Supreme Court of Illinois, No. 34225, where the challenged judgment was affirmed, *People* v. *Crump*, 12 Ill. 2d 402,[2] and of the record of the Supreme Court of Illinois, No. 33334, in the first trial, which was reversed on an evidentiary point. *People* v. *Crump*, 5 Ill. 2d 251. On November 23, 1960, the trial court entered its Findings of Fact and Conclusions of Law and dismissed this action.

The record in this proceeding reflects the following facts. The petitioner, who was twenty-two years of age at the time (R. 1579) and who earlier had attended high school

1. References to the record of the Supreme Court of Illinois No. 34225, which affirmed the challenged judgment of conviction, are indicated as follows: (R. ....). References to the record of proceedings in the United States District Court are indicated as follows: (Tr. ....). References to the record of the Supreme Court of Illinois No. 33334, which reversed the conviction after the first trial, are indicated as follows: (No. 33334 R. ....).

2. This Court denied his petition for writ of *certiorari*. *Crump* v. *Illinois*, 357 U. S. 906. A petition for rehearing thereon was also denied. *Crump* v. *Illinois*, 357 U. S. 944.

(R. 1417), was taken into custody by officers of the Chicago Police Department on March 20, 1953 and held until March 23 when he was released (R. 79-80). In high school, he participated in wrestling, swimming, and basketball. He was also a member of the bugle corps and the Sons of the American Legion (R. 1417-1418). In his testimony in the State court, the petitioner contended that during this period he suffered physical brutality at the hands of policemen. This was categorically denied by the policemen at the State trial.

After his release on March 23, 1953, the petitioner became ill with a fever and went to the office of Dr. Isaac Rosen for examination and treatment (R. 80-81). During the preliminary hearing on the petitioner's motion to suppress the challenged confession, Dr. Rosen testified on behalf of the State. He stated that, during his examination, he did not discover any bruises or contusions or abrasions of any type. The petitioner did not complain of any bruises or abrasions (R. 351). During the trial of the case before the jury, Dr. Rosen testified on behalf of the petitioner. On cross-examination, he stated that the petitioner did not complain about any lumps, beatings, or injury to his back or his face. He did not display any beating marks. The petitioner complained only of a cold. During his examination, this doctor did not see any bruises, cuts, or lumps on his back. There were no kick marks or swellings on his back nor any injury to his hands (R. 1532-1534).

The petitioner was taken into custody again on March 26, 1953 at his home between 4:30 and 5:00 A. M. (R. 85-86). According to the Bill of Particulars, filed by the petitioner in the United States District Court on January 19, 1960, the critical period in this controversy begins with this arrest. The petitioner arrived at the Criminal Court Building at 5:00 A. M. (R. 91). He claimed that he was physically abused by police officers at the time of arrest,

during the journey to the Criminal Court Building and after his arrival (R. 88-94). These charges were denied by the officers who attended the arrest and delivery to the Criminal Court Building (R. 215-220; 248-251; 269-271; 275-277; 280-282; 284-286; 290-292; 294-297; 301-302). Officer Bongiorno testified that the petitioner was in his squad car. Before they arrived at the court building, they stopped at a restaurant and purchased the petitioner coffee and a doughnut (R. 218).

The petitioner testified that Irwin Bloch, an Assistant State's Attorney, arrived about 7:00 A. M. (R. 94). He was questioned during the day (R. 96). He appeared in the lineup that morning (R. 97; 437). He was returned to the Stock Yards Station where he remained overnight (R. 98). He left the State's Attorney's office about 5:30 P. M. (R. 498). He testified that he did not have any food and could not remember if he was offered any food (R. 98). The attending police officer testified the food was purchased for the petitioner and Eugene Taylor and given to them (R. 498-499).

The following day, Friday morning, after a night's rest, the petitioner was returned to the office of the State's Attorney where he talked privately to Mr. Austin, the First Assistant State's Attorney. Mr. Austin gave him a cigarette (R. 98-99). According to the petitioner, Mr. Austin assured him that he would receive at least a part of the $5,000 reward if the petitioner would assist him in the solution of the Libby McNeil & Libby robbery (R. 100). Mr. Austin denied this (R. 540).

It was at this point that the petitioner requested to see his attorney. This was the petitioner's first request for a lawyer. He did not ask to see a lawyer on Thursday, March 26 (R. 553). Mr. Austin inquired as to who his attorney was and petitioner answered William P. Gerber

(R. 100; Tr. 198). The petitioner testified that Mr. Gerber had handled some legal matters for his family (R. 146). He represented the petitioner in the first trial of this case (Tr. 192). Mr. Austin immediately telephoned Mr. Gerber and advised him that a client wished to speak with him. Mr. Austin then advised the petitioner that Mr. Gerber was on his way, and he and the petitioner remained in the office alone until Mr. Gerber's arrival (R. 100-102). This occurred Friday, March 27, between 11:00 A. M. and 1:00 P. M. (R. 544).

Upon Mr. Gerber's arrival, Mr. Austin left his office to allow the petitioner to speak with his attorney privately (R. 102). Mr. Gerber testified that he was in Mr. Austin's office "a good part of an hour and a half" and that Mr. Austin did not hinder him when he conferred with the petitioner (Tr. 185, 193). In the federal proceeding, the petitioner testified that Mr. Gerber spoke with him about forty-five minutes (Tr. 201). In the state trial, he stated that the conference lasted fifteen minutes (R. 181).

This event was described by the petitioner when he testified on his motion to suppress as follows:

> "Q. And then Mr. Austin again spoke to you?
>
> A. Mr. Austin hung up the phone and he turned to me and said 'your lawyer is on his way, your attorney is on his way.'
>
> Q. Did you remain in Mr. Austin's presence after that?
>
> A. I remained in Mr. Austin's presence until Mr. Gerber came.
>
> Q. Was anybody else present on the arrival of Mr. Gerber, besides you and Mr. Austin?
>
> A. Not in the room where we were in, they were not.
>
> Q. Did you hear Mr. Austin and Mr. Gerber talk to one another?
>
> A. Yes, I did.

Q. What words were passed between Mr. Austin and Mr. Gerber?

A. Upon Mr. Gerber's arrival, he asked to speak with me in privacy, to Mr. Austin. He asked that of Mr. Austin.

Q. And you did speak outside the presence of Mr. Austin with Mr. Gerber?

A. Yes. Mr. Austin left the room and left Mr. Gerber and myself there.

Q. What did Mr. Gerber say to you and what did you say to him?

(Argument between attorneys about attorney-client privilege.)

A. I told Mr. Gerber about the conversation I had with Mr. Austin with regard to my participation in the reward money.

Q. Yes.

A. And Mr. Gerber asked me to tell him word for word what was said and I did; and he told me, he said 'well, you wait just a moment and I will go over and talk with Mr. Austin and see what is the deal here' and he left the room.

Q. Then you went back to Mr. Austin?

A. I was still in Mr. Austin's office then. He left the room.

Q. Then what happened?

A. Then he came back with Mr. Austin, Chief O'Malley, Captain Reynolds. I believe there were three of them. They came back into the room and when they came back, Mr. Gerber told me in front of Mr. Austin, he said 'Now Dick, you hear this, and all the rest of you men for witnesses, I advise this man here not to say anything unless I am in his presence.'

Q. And when he said 'Dick' he referred to Mr. Richard Austin.

A. Yes.

Q. Anything further?

A. He told me, 'Now, you, Paul, if they ask you the time of day, everything is secret, you are to tell

them you cannot answer except upon advice of your lawyer, me.' " (R. 102-105.)

When the petitioner was testifying in the trial of the case before the jury, he summarized Mr. Gerber's advice in the following words:

> "A. Well, they came into the room, and Mr. Gerber addressed me in front of those men I have named. And he told them, 'Now Dick, you hear this. I am advising my client not to say anything to anyone except upon my advice.' And he told me, he says, 'Paul, and if anyone asks you for a match, you tell them you can't give it to them unless you have the advice of your counsel.' He said, 'Do you understand?' I said, 'Yes, sir.' And he asked Mr. Austin and the rest of them did they understand it. They said, yes. Then he walked out." (R. 1465.)

In this regard, the testimony of the petitioner in the United States District Court was substantially the same (Tr. 202). In the federal *habeas corpus* proceeding, Mr. Gerber testified that Mr. Austin said, "I will call you if there is (*sic*) any further statements to be taken." (Tr. 186.) The petitioner never mentioned this in the second trial. There is no evidence on this point in the second trial, which resulted in the challenged conviction. The petitioner, however, did testify as to an alleged agreement by Mr. Austin in the first trial (No. 33334—R. 2544). Mr. Austin denied the existence of any such agreement (No. 33334—R. 2813).

After that, the petitioner testified that he was taken to the lockup room. He remained there from 3:00 o'clock in the afternoon until 10:30 that evening (R. 1465-1466). The officer in charge of the lockup room denied that the petitioner was beaten or abused in any manner (R. 470-471). Then he returned to the office of Mr. Austin (R. 140, 1468). When the petitioner requested to see his attorney at this time he testified that Mr. Austin told him that Mr. Gerber

was in jail for consorting with criminals. Eugene Taylor told him that Mr. Gerber was in jail for consorting with criminals (R. 112-113). On cross-examination on the motion to suppress, the petitioner testified that he believed he told Mr. Austin that he did not want to say anything until he saw his lawyer, and that Mr. Austin said that his attorney was in jail for consorting with criminals (R. 151-154). During recross examination on the trial before the jury he testified that he believed Mr. Austin said his lawyer was in jail for consorting with criminals (R. 1609) although he did not say that he requested to see his attorney. On the trial, Mr. Austin denied that he made any such statement (R. 1677).

The petitioner's testimony during the first trial regarding the claimed arrest of his lawyer presents an entirely different version. He was engaged in a conversation with Harold Riggins and Gene and David Taylor. He had heard from one of these individuals, possibly Gene or David Taylor, that their lawyer was in jail (No. 33334—R. 2560-2562). At no time did the petitioner attribute this statement to Mr. Austin.

The trial of this case on the merits proceeded immediately after the denial of the petitioner's motion to suppress on Friday, December 2, 1955 (R. 651-652). The petitioner testified at length before the jury (R. 1414-1474; 1503-1525; 1535-1611; 1699-1704). At no time did he state or even suggest that he made a second request to see his attorney during the evening of March 27, 1953 when he confessed orally to Mr. Austin.

During the course of the federal *habeas corpus* proceeding, the petitioner insisted that he requested to see his attorney innumerable times (Tr. 223). His own testimony in the State criminal proceeding, however, mentions only two requests: the first request, which Mr. Austin honored when he called Mr. Gerber. The second request which led

to the claimed statement that Mr. Gerber was in jail, and which is disputed by Mr. Austin's testimony.

According to the petitioner, Mr. Austin stated that he had a warrant for the arrest of petitioner's wife (R. 143). During the trial of the case in chief before the jury, the petitioner said that Mr. Austin did not say that the petitioner had better make a statement or he would cause the arrest of petitioner's wife (R. 1608). Mr. Austin denied that he threatened to arrest petitioner's wife unless he made a statement (R. 540; 1677). He denied that anyone in his presence abused or mistreated the petitioner (R. 542).

The petitioner confessed orally to Mr. Austin that night (R. 158-59). Thereafter, Mr. Austin arranged for the petitioner to sleep in the witness quarters, an annex of the County Jail building (R. 1470).

The following morning, the petitioner had a breakfast of coffee, toast and scrambled eggs on the fifth floor of the administrative building of the County Jail (R. 611). He signed the statement at the State's Attorney's office on the morning of March 28. A number of disinterested outsiders were present to witness the signing to protect the prosecution against any frivolous claim of duress (R. 446-447).

That morning, the petitioner was asked as to the kind of treatment he had received (R. 625). Mrs. L. Robert McBlin testified that on the morning of March 28, the petitioner said that he was not abused or mistreated. He had been treated very well while he was in custody (R. 568, 1664). Graydon Megan, who also witnessed the signing, testified that the petitioner stated that he was not mistreated while he was in custody. No threats or promises had been directed toward the petitioner (R. 307, 310, 1670). According to the testimony of Dr. William A. Brams (R. 363, 365, 1690-91), the petitioner stated that he was well treated while he was in custody, and had no complaints. He made

no complaints about his physical condition or any type of physical injury. The doctor found no bruises, welts or marks of physical violence or injury.

The petitioner corroborated the testimony of these persons (R. 626, 1573). On November 29, 1955, during the course of the hearing on his motion to suppress, the petitioner testified that he had received no ill treatment in the State's Attorney's office. He gave substantially the same testimony in the first trial (R. 189-190).

On November 23, 1960, the United States District Judge, after he had heard the testimony of the petitioner and his attorney, William P. Gerber, and had analyzed the entire record of the judicial proceedings in the State of Illinois, entered his Findings of Fact and Conclusions of Law and dismissed this *habeas corpus* proceeding. That Court made two findings on the question of the alleged involuntary confession and the alleged denial of the petitioner's federal constitutional rights. First, he found that the State court correctly determined that the challenged confession was given freely and voluntarily by the petitioner. Second, on the basis of the testimony and record before him in the federal *habeas corpus* hearing, he made his independent finding that "the challenged confession was given by the petitioner freely and voluntarily." These are reflected in his third finding of fact, which reads as follows:

> "3. The record of the entire state court proceeding is entitled *People* v. *Crump*, Supreme Court of Illinois, No. 34225. The respondent has filed this record in this Court and has incorporated it as an exhibit to his Answer. This Court has read the entire state court record and has carefully studied the contents thereof. William P. Gerber, an attorney, and the petitioner testified in this federal court proceeding on behalf of the petitioner. The respondent presented no testimony.

Within the twenty-four hour period immediately prior to the signing of the challenged written confession by the petitioner at the State's Attorney's office, Richard Austin, First Assistant State's Attorney of Cook County, Illinois, in response to the petitioner's request, notified the said attorney, William P. Gerber, that the petitioner desired to speak with him. Upon Mr. Gerber's arrival at the office of the State's Attorney, he was provided with an office where he conferred with the petitioner, privately and without hindrance. Mr. Gerber did advise the petitioner not to say anything further unless he was present. The records of the state court proceeding disclose that the petitioner testified in a judicial proceeding in the Criminal Court of Cook County that he had not received any ill treatment while he was in the State's Attorney's office.

The material allegations of the petition, relating to the question of the voluntary nature of the challenged confession, were fairly raised and fully explored in the state court proceedings, as disclosed by the state court records. They were reviewed and carefully considered by the Supreme Court of Illinois. *People* v. *Crump*, 12 Ill. 2d 402. A petition for *certiorari* was denied by the Supreme Court of the United States. *Crump* v. *Illinois*, 357 U. S. 906.

The petitioner's rights under the federal Due Process Clause and his asserted claim thereunder were accorded full and fair consideration in the state court proceedings.

On the basis of the state court record and of the testimony in this court, the determination of the state court that the challenged confession was given freely and voluntarily by the petitioner and that there was no denial of federal due process of law is correct. The challenged confession was given by the petitioner freely and voluntarily."

The judgment was affirmed by the United States Court of Appeals for the Seventh Circuit. *United States of America ex rel. Paul Crump* v. *Frank G. Sain, Sheriff* (7 Cir., 1961), 295 F. 2d 699. A petition for rehearing was denied by that Court on November 14, 1961.

ARGUMENT.

The United States District Judge did not base his ultimate dismissal of this federal *habeas corpus* proceeding solely upon his determination that the alleged federal claim was fairly raised and fully explored in the State court proceedings, as disclosed by the State court records, and that the State court had correctly determined that the challenged confession was given freely and voluntarily by the petitioner. As a matter of federal law, it would not have been error if the United States District Judge had stopped at this point. This judicial finding, alone, would have justified the order of dismissal. *Brown* v. *Allen*, 344 U. S. 443, 465. The petitioner does not enjoy an absolute and unqualified right to a full hearing. This is wholly within the discretion of the federal district judge. If that judge's determination that the petitioner's federal constitutional rights were protected and satisfied in the state court proceeding does not constitute an abuse of discretion, the district judge is warranted in his denial of relief without any further hearing. *Thomas* v. *Arizona*, 356 U. S. 390, 403.

The United States District Judge, however, accorded a hearing to the petitioner, wherein he and his attorney, William P. Gerber, were given an opportunity to testify. Prior to the taking of this evidence, the district judge stated that he would not allow testimony which had been advanced in the State court proceeding but "I shall offer you the opportunity to present additional testimony or testimony that is different from what has been heretofore given, whether it is by the same witness or other witnesses, but it shall be limited to this new subject matter that has been presented. I do not think we need to go into anything except the new subject matter which has been

brought in here" (Tr. 130). Despite this opportunity, the petitioner presented no new evidence. An analysis of the testimony of these two witnesses (Tr. 173-216) will indicate that it was substantially the same as that given in the State court proceeding. Moreover, the petitioner made no effort whatever to introduce any evidence on his allegations that the State's Attorney had procured witnesses to testify falsely against the petitioner, that the State's Attorney had procured the suppression of any evidence, and that the State's Attorney had conspired with police officers and employees of the firm of Libby, McNeill and Libby to obtain a confession from the petitioner by illegal means—claims which the petitioner advanced for the first time in this federal *habeas corpus* proceeding and which had never been presented to the Illinois courts. By virtue of Rule 52(a) of the Federal Rules of Civil Procedure, which is applicable to *habeas corpus* proceedings, *Rushing* v. *Wilkinson* (5 Cir., 1959), 272 F. 2d 633; *cert.* denied, 364 U. S. 914, the district judge was entitled to examine and appraise the testimony and claims of the petitioner, in the light of all evidence in the proceeding, including the record of the State court proceeding, together with any inconsistencies therein. The district judge exercised this authority and made the independent finding that "the challenged confession was given by the petitioner freely and voluntarily."

We submit that the entire record in this proceeding more than amply supports the findings of the trial court and, accordingly, should not be disturbed. The bare fact of police detention and police examination in private of one in official state custody does not render involuntary a confession by one so detained. *Brown* v. *Allen*, 344 U. S. 443, 476. The failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate will not render involuntary the con-

fession of one detained under those circumstances. *Crooker* v. *California*, 357 U. S. 443, 437. The refusal of police to permit a prisoner to consult with his lawyer, while being questioned by the police, does not of itself violate the Fourteenth Amendment. *Crooker* v. *California*, 357 U. S. 443, 440-441; *Cicenia* v. *Lagay*, 357 U. S. 504, 508.

I.

The Decision Below Is Clearly Correct.

In his petition, the petitioner appears to create the impression that the detention existed for eight consecutive days and nights. Such is not the case. The first arrest was made March 20, 1953 and the petitioner was released on March 23, 1953. He was re-arrested on March 26, 1953. Three days had intervened. Despite the petitioner's testimony of extreme brutality during the first period of detention, the testimony of Dr. Isaac Rosen, his personal physician, destroys any such contention. The doctor, who examined the petitioner thoroughly shortly after his release on March 23, 1953, stated that he found no injuries or evidence of physical harm. He further stated that the petitioner made no complaints about injury or physical harm. The petitioner complained only of a cold.

The case at bar presents no problem which arises out of police refusal to allow a prisoner to consult with a lawyer while he is being questioned by the police. It is undisputed on this record that the petitioner requested to consult with an attorney, known to himself and to his family, and that the prosecutor *immediately* honored this *first* request and arranged for a meeting. By his own word, the petitioner was allowed to consult privately with the lawyer of his choice. This private conference was held at the State's Attorney's office, lasted from fifteen to forty-five minutes, and was not hindered by the prosecuting author-

ities. He was instructed by his attorney not to make any statement. No contention has ever been made in this proceeding that the petitioner was a person of weak mentality. His high school education and his extracurricular participation in swimming, wrestling and basketball, as well as band activities, would tend to indicate the contrary. The fact that the petitioner, a person twenty-two years of age with high school training, chose to disregard this simple, clear-cut legal advice before the day ended when he made oral statements and less than twenty-four hours later when he signed the confession is his responsibility and not that of the State.

Much is now being made of his alleged second request to see his attorney during the evening of March 27, 1953. This alleged fact now appears to have become the factual cornerstone upon which the petitioner builds his entire argument. Despite the current importance of that factual claim, the petitioner failed to make any mention of it during his long period of testimony in the trial before the jury. His testimony was that he asked his companions why they did not heed Mr. Gerber's advice (R. 1609), and this, if true, indicates that the petitioner was aware of that advice. If this alleged second request for an attorney and the State's Attorney's refusal thereof constituted such an important element in his basic claim of coercion, it is reasonable to expect him to give testimony regarding it before the jury. This glaring failure on the part of the petitioner casts a dark shadow upon the plausibility of his contention.

The testimony that Mr. Austin stated that Mr. Gerber was in jail for consorting with criminals merits the same appraisal. The petitioner so testified during the second trial. During the first trial, however, he received this information from one of his companions in the lockup. Moreover, his testimony in the federal proceeding that he re-

quested a lawyer on innumerable occasions cannot be reconciled with the whole of his testimony in the State proceeding where he testified to only two requests. The first request was honored and his lawyer was called. The circumstances surrounding the second request are disputed.

Prior to his signing the challenged confession, the petitioner was expressly asked whether he was mistreated in the State's Attorney's office. This was his opportunity to voice any complaint which he might have. The petitioner not only failed to complain, but actually stated that he was well-treated. Disinterested citizens, who were present when the petitioner signed the confession, testified that he made no complaint and said he was well-treated. According to Dr. Brams, the petitioner made no complaint of physical harm or abuse. The doctor examined the petitioner and found no evidence of injury or violence. The petitioner did not dispute this but actually corroborated these statements during the course of his own testimony. On November 29, 1955, two years and eight months after the alleged abuse and coercion, he persisted in independent testimony that he was treated well in the State's Attorney. Such admissions by the alleged victim himself are not consistent or compatible with any claim of coercion.

II.

There Is No Conflict of Decisions.

1. The decision below does not conflict with *Crooker* v. *California*, 357 U. S. 433. In *Crooker*, the prisoner's request to see an attorney was denied. Such is not the case in this proceeding.

2. There is no conflict with *Spano* v. *New York*, 360 U. S. 315. In *Spano*, the prisoner was named in an indictment and the judicial proceeding had commenced when the challenged confession was taken. The prisoner's request

to see his attorney was refused. The confession was obtained through trickery, which was practiced upon the prisoner by a close friend, who was a member of the police force. These elements are absent in the instant proceeding. The petitioner was not held incommunicado. He conferred with his attorney.

3. The decision of the Supreme Court of Illinois in *People* v. *Jackson*, 23 Ill. 2d 263, presents no conflict. In that case, the Court excluded a judicial confession given in a preliminary hearing because the defendant was unattended by counsel and was not advised of his constitutional right against self-incrimination. The decision is consistent with the spirit of *Spano*. It correctly distinguished this situation from that of an extrajudicial confession. *People* v. *Jackson*, 23 Ill. 2d 263, 265.

III.

There Is No Important Question of Federal Law.

The decisions of this Court in *Crooker* and *Cicenia* support the proposition that the refusal of police to permit a prisoner to consult with his lawyer, while being questioned by the police, does not of itself violate the Fourteenth Amendment. In this proceeding, however, the State's Attorney honored the petitioner's request to see his attorney. That attorney did advise the petitioner within the twenty-four hour period prior to the signing of the confession but the petitioner chose to disregard it. This occurred on March 27, 1953. The previous night, namely March 26, 1953, he had not been questioned by the State's Attorney. He left the office of the State's Attorney on March 26, 1953 about 5:30 P. M. and was taken to a police station where he was fed and where he remained overnight. When he signed the confession on March 27, 1953, the petitioner made no complaint. On the contrary, he has persisted in his statement that he was well treated.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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March 13, 1962.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 717

PAUL CRUMP,

Petitioner,

vs.

FRANK G. SAIN, Sheriff,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent's Brief in Opposition has completely fogged the issues which the uncontroverted facts in the record present. This effect has been achieved by omitting reference to critically important circumstances which are clear in the record.

Respondent makes no mention of the fact that petitioner made *two* confessions, not just one. Yet this fact is crucial for two reasons:

(1) Petitioner's first confession was made after more than eight hours of continuing interrogation and line-up exhibitions during which time he was held incommunicado. At the beginning of this period he had been sick in bed with a temperature of 103.6°. During this period he was interrogated by at least four of the top law enforcement officials in Cook County, being passed from Lt. McMahon to Lt. Olsen, to Prosecutor Austin, to Lt. Olsen and Prosecutor Bloch, to Prosecutor Austin again.

At the end of this session petitioner confessed. He was not cautioned or advised of his rights prior to this confession. These facts are clear and undisputed. See pages 15 to 19 of the Petition for Certiorari.

(2) At the time the prosecuting authorities obtained this first confession, they had abundant evidence with which to indict and convict petitioner of murder. They had not only the confession, but "three or four" eye witness identifications. (Ex. A, Abst. 433, Prosecutor Austin). From that moment on, it is clear that the authorities "were not merely trying to solve a crime, or even to absolve a suspect." *Spano* v. *New York*, 360 U.S. 315, 323 (1959).

What the authorities were out to do was to cinch the conviction of petitioner and maximize his sentence on the basis of testimony from his own lips which they knew full well could never be obtained in open court or in the presence of counsel. Although the authorities had already succeeded in inducing their fever-ridden prisoner to accuse himself of participation in the murder-robbery, they were bent upon placing the murder weapon in his hands, so that his sentence might be increased. This is the only possible explanation for their acts, since it is clear under Illinois felony-murder doctrine that a confession to participation in a robbery in which a killing has occurred is a confession to murder, without regard to who fired the fatal shot. *People* v. *Marshall*, 398 Ill. 256, 262-63 (1947); *People* v. *Watt*, 380 Ill. 610, 616 (1942); *People* v. *Anderson*, 239 Ill. 168, 184 (1909).

At noon on the day following petitioner's first confession, on the advice of his attorney in the presence of the First Assistant State's Attorney of Cook County, petitioner invoked his undoubted right to remain silent. See Petition for Certiorari, pp. 20-21.

Of course it is simpler to cinch a conviction in the absence of a defendant's counsel than in his presence. And it is far easier to do so by over-riding the prisoner's claim to his constitutional right to remain silent than by respecting it. So instead of placing petitioner in jail pending indictment, or taking him before a judge or magistrate, the prosecution took him to a "lockup room" downstairs, sat him down at a table, handcuffed him to a chair, and resumed its preparation for trial, by continuing petitioner's cross-examination for another eight hours or so. See Petition for Certiorari, pp. 21-22.

At the end of this session, the prosecution was ready to go back "on the record" once more. Of course there is some confusion about what transpired next. As respondent correctly points out, "the circumstances surrounding [petitioner's] second request [for counsel] are disputed." Brief in Opposition, p. 16. The "circumstances surrounding" the request may be disputed, but the request itself is not. And the disputation is caused by the prosecution's own act in staying "off the record' for a time even after the court reporter, who had been called to take the second confession, was actually in the room. See Petition for Certiorari, pages 22-23.

But even after the *second* confession had been obtained, the prosecution had not finally cinched the conviction. For that, a "jury" was needed.

And so a jury (at least one of whose members had been "standing by" for days, see Petition for Certiorari, p. 26, n. 140) was selected and assembled to attest to the last act of this travesty on fair procedure. Some 20 to 40 policemen, prosecutors, physicians, lawyers, executives, and officials were present at the signature ceremony. All that was lacking was a judge, a clerk, and a

lawyer for the defendant. Petition for Certiorari, pages 25-26.

When the ceremony was ended, so, for all practical purposes, was the trial. Notwithstanding the hotly contested proceedings yet to be gone through, petitioner was a convicted man when he walked out of the room where he had signed the second confession.

At the very least, the assertion that this pre-trial discovery and perpetuation of testimony procedure was fundamentally unfair is not frivolous. It deserves plenary consideration by this Court. When life is at stake, as it is here, such a substantial claim of Constitutional right should not be shrugged off on the basis of the Court of Appeals' casual assumption that petitioner and his prosecutors "were meeting at arms length," after it was decided by the interrogators to ignore petitioner's explicit claim to his Constitutional right to silence. See Opinion, Petition for Certiorari, Appendix A, p. 6a.

The prosecution could not have done this in open court. *People* v. *Jackson*, 23 Ill. 2d 263, 178 N.E. 2d 310 (1961). The police should not be permitted to do it to a man handcuffed to a chair in a lockup; a prosecutor, no matter how dedicated, should not be permitted to do it before a "jury" in his office.

Respectfully submitted,

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Attorney for Petitioner.

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IN THE

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FRANK G. SAIN, Sheriff,

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PETITION FOR REHEARING.

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Respondent.

PETITION FOR REHEARING.

Now comes petitioner Paul Crump, by his attorney Donald Page Moore, and petitions the Court to rehear and reconsider its denial of the petition for certiorari in this case, entered on March 26, 1962 (Mr. Justice Douglas and Mr. Justice Brennan dissenting).

This petition is presented pursuant to Rule 58(2) of this Court.

ADDITIONAL QUESTION PRESENTED.

Was not petitioner denied due process of law when the Illinois Supreme Court explicitly weighed the probable credibility of his confession in determining whether it was voluntary?

ADDITIONAL REASONS FOR GRANTING THE WRIT.

The decision of the Illinois Supreme Court in petitioner's case squarely conflicts with the holding of this Court in *Rogers v. Richmond*, 365 U.S. 534 (1961). In considering the question whether petitioner's confession was coerced in violation of the Fourteenth Amendment (see 12 Ill. 2d at 404), the Illinois Supreme Court explicitly stated:

> "Of considerable significance is the fact that the officers found the revolver at the place designated by the defendant. Of more than passing relevance is the fact that the inquiring officers asked the defendant about a grey felt hat, size 7, Dobbs make, bearing the name of J. G. Tobias, 2403 W. Madison Street, Chicago. Defendant said it was his hat that he wore on the day of the robbery and that it was lost in flight. In placing the hat upon his head, it was found that it fit him. The mask and gloves also found in the path of defendant's departure were identified by him."
>
> *People* v. *Crump*, 12 Ill.2d 402, 405 (1958).

Thus the Illinois Supreme Court has explicitly weighed the probable credibility of petitioner's confession in reaching its conclusion that the confession was not coerced in violation of the Fourteenth Amendment. In so doing, the Illinois Supreme Court has flatly contravened the precise holding of *Rogers v. Richmond*.

This holding by the Illinois Supreme Court is in accordance with a long line of Illinois holdings to the same effect. For example, in *People* v. *Fox*, 319 Ill. 606, 616 (1926), the Illinois Supreme Court stated:

> "The rule requiring a showing that a confession is voluntary . . . 'was not established to protect the

guilty against his truthful confession, but is designed to guard the innocent against a false confession . . .'"

Accord, *People* v. *Miller*, 13 Ill. 2d 84, 96 (1958), *People* v. *Hall*, 413 Ill. 615, 623-24 (1953), *People* v. *Lazenby*, 403 Ill. 95, 101 (1949), *People* v. *Klyczek*, 307 Ill. 150, 155 (1923).

CONCLUSION.

Petitioner is awaiting execution in the State's electric chair. The key issue in his case has never been reviewed by a court which applied a proper Constitutional standard. This circumstance, in conjunction with the circumstances which led two Justices of this Court to dissent from the original denial of certiorari, warrants a full hearing by this Court.

WHEREFORE, petitioner prays that this Court reconsider its denial of the petition for certiorari.

Respectfully submitted,

DONALD PAGE MOORE,
Attorney for Petitioner

CERTIFICATE.

Donald Page Moore, a member of the bar of the Supreme Court of the United States, hereby certifies that the attached petition for rehearing is presented in good faith and not for delay, and is restricted to substantial grounds available to petitioner although not previously presented to this Court.

DONALD PAGE MOORE,
Attorney for Petitioner